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2015 Pension, Benefits and Executive Compensation Update

January 21, 2015

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Pension Annuity Buy-ins and Buy-outs: Understanding the Legal Issues

Lisa J. Mills

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DB Pension Plan De-risking



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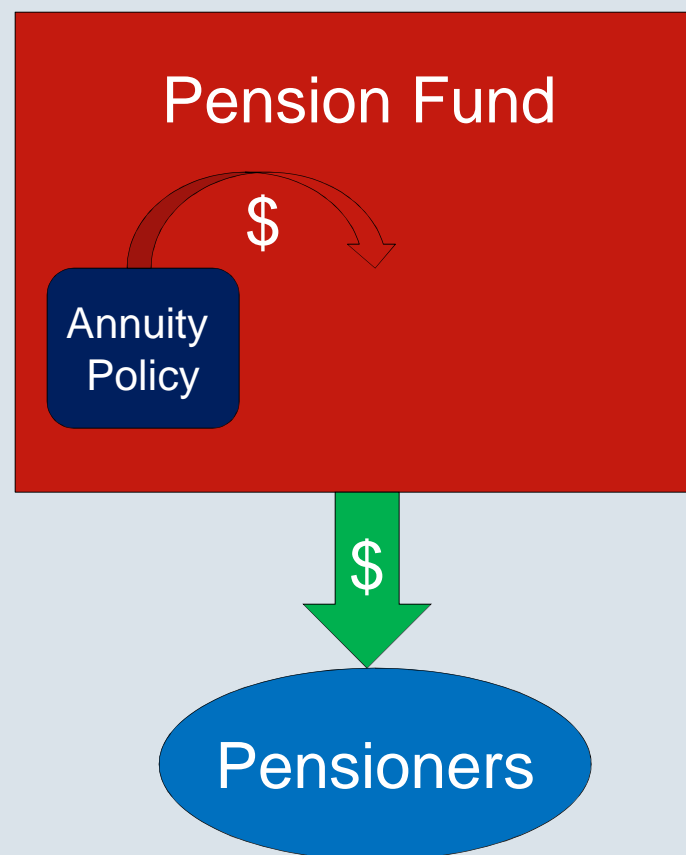
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DB Pension Plan De-risking

- De-risking of defined benefit (DB) pension plans takes a number of forms
- Focus today is on two de-risking strategies that use annuities to address investment and longevity risk: the buy-in and the buy-out
- Planning takes time – identify issues and strategy in advance so that annuity purchase can be triggered when market terms are most suitable

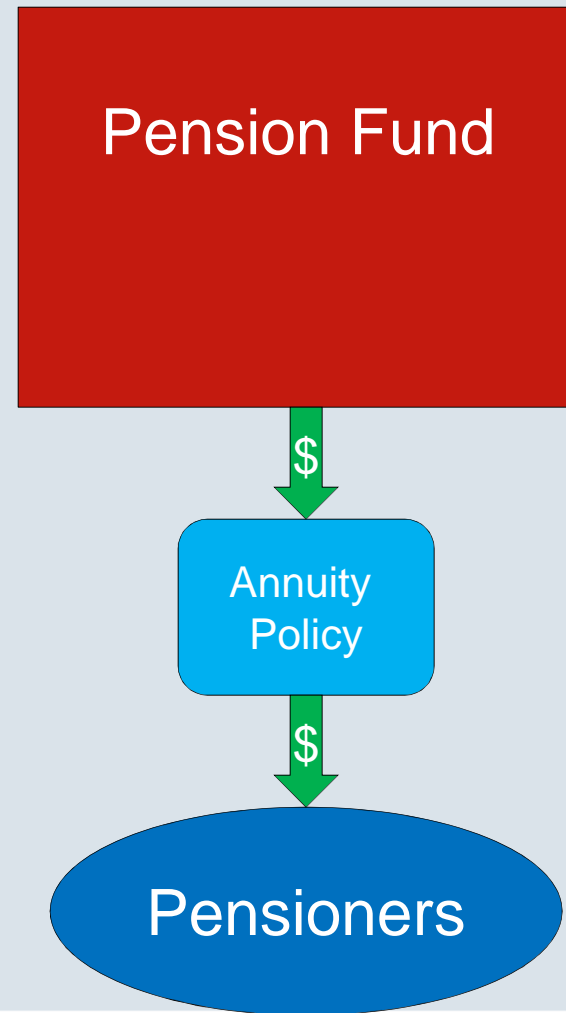
What is an Annuity Buy-In?

- Single premium paid to insurer
- Investment of the pension fund
- Insurer pays pension fund
- Value based on pensions payable to "reference pensioners"
- Pensioners paid by pension fund
- Asset for valuation purposes equal to value of liabilities
- Convertible to buy-out annuity at any time, revocable in the case of a plan wind up



What is an Annuity Buy-Out?

- Single premium paid to insurer
- Benefits of pensioners or deferred vested members are "settled"
- Insurer assumes responsibility for paying pensions directly to pensioners
- Annuity policy may be an asset of plan for valuation purposes
- Irrevocable



Buy-Ins vs. Buy-Outs: Comparing The Issues

Mills & Monkman Ltd. Pension Committee Meeting

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Buy-Ins vs. Buy-Outs: Comparing The Issues

Permitted By Plan Terms?

Buy-In	Buy-Out
Does plan text restrict buy-in annuity purchases?	Does plan text permit annuity buy-out to be completed?
Does SIP&P restrict buy-in annuity purchases?	Does a buy-out discharge the plan under applicable legislation or under contractual terms of the plan?
Also necessary to review trust documentation and assess whether amendments are necessary to permit annuity to be held in the pension fund	Also necessary to review pension legislation on annuity buy-outs for province of registration and province of affected pensioners

Buy-Ins vs. Buy-Outs: Comparing The Issues

Labour Relations Issues?

Buy-In	Buy-Out
Collective agreement language should be reviewed to identify any constraints or notifications required to be provided to bargaining agents	Collective agreement language should be reviewed to identify any constraints or notifications required to be provided to bargaining agents

Buy-Ins vs. Buy-Outs: Comparing The Issues

Approval/Governance Process?

Buy-In	Buy-Out
<p>As an investment, purchase of annuity is subject to approval/governance process applicable to plan investments</p> <p>Identify which entities must review and recommend/approve annuity purchase under governance model</p>	<p>Existing governance documents should be reviewed to determine appropriate entities responsible for approving buy-out</p> <p>Approval/governance process may depend on the steps required to be completed (e.g. does the plan text need to be amended?)</p> <p>Consider impact of buy-out on plan sponsor's financial statements in assessing appropriate governance process</p>

Buy-Ins vs. Buy-Outs: Comparing The Issues

Statutory Discharge?

Buy-In	Buy-Out
No jurisdiction's pension legislation provides a discharge to the administrator for annuity buy-in purchase	Some jurisdictions provide a discharge to the administrator upon completion of a buy-out for a continuing pension plan
Pension plan remains responsible for payment of benefits	Pension plan may remain responsible for payment of benefits in the event that the insurer issuing the annuity becomes insolvent
If plan winds up in a deficit, annuity purchase must be "unwound"	Requires a top-up payment at time of annuity purchase if plan not fully funded

Buy-Ins vs. Buy-Outs: Comparing The Issues

Counter Party Risk?

Buy-In	Buy-Out
<p>Assuris coverage in the event of a default by the insurer is limited to:</p> <p>85% of the value of the entire annuity policy</p> <p>Plan will remain responsible for loss of 15% of policy in the event of the insurer's default on its payment obligations</p>	<p>Assuris coverage in the event of a default by the insurer is limited to the greater of:</p> <p>\$2,000 per month per pensioner or 85% of the value of each annuity policy</p> <p>Possible to "stack" annuities for each individual pensioner with different insurer, such that no annuity exceeds \$2,000 per month and annuities have full Assuris coverage</p>

Buy-Ins vs. Buy-Outs: Comparing The Issues

Income Tax Issues?

Buy-In	Buy-Out
No income tax implications or compliance issues provided that the annuity is not a prohibited investment and otherwise complies with investment regulations	<p>Tax treatment of payments to pensioners from a buy-out annuity is the same as pension payments from the plan only if certain <i>Income Tax Act</i> requirements are satisfied</p> <p>If annuity is not <i>materially different</i> than what the plan otherwise would provide, pensioners retain tax deferral</p> <p>Differences between pension paid under plan terms and annuity terms could cause the pensioners to be taxed on the full value of the annuity</p>

Buy-Ins v. Buy-Outs: Comparing The Issues

Indexing Issues?

Buy-In	Buy-Out
<p>Not necessary to purchase annuities that provide for indexing</p> <p>If indexing is not guaranteed in the plan, purchasing an annuity that includes some form of indexing may be perceived as a guarantee</p>	<p>Indexed annuities are costly</p> <p>Contractual indexing in pension plans takes different forms but insurers will match objective indexing features only (e.g. CPI-dependent or fixed)</p> <p>Change to the plan's indexing formula may not be permitted under plan terms or pension legislation</p> <p>Income tax issues</p>

Putting The Decision Into Effect

- Record decision and relevant considerations in case decision is challenged in future
- Establish a detailed work plan/process to expedite purchase when pricing is favourable
- Consider potential to transfer fixed income assets in kind to insurer as part of premium
- Review template annuity contract as part of due diligence

Putting The Decision Into Effect

- Practical tips:
 - Consider mortality experience
 - Clean your pensioner data
 - Explore "on the shelf" quotations

Defined Contribution Plans Update

Jordan N. Fremont
Susie S. Taing

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Defined Contribution Plans Update

- CAPSA's Defined Contribution Pension Plans Guideline (Guideline No. 8)
- *New* Alberta *Employment Pension Plans Act* ("EPPA") and Regulations
- Ontario Retirement Pension Plan ("ORPP")
- Proposed amendments to the federal *Pension Benefits Standards Regulations, 1985* ("PBSR")

Proposed Federal PBSR Amendments

- Disclosure requirements for "member choice accounts"
 - SIP&P to be replaced by statement that sets out prescribed investment fund information
- DC pension option
 - Proposed rules cover payment period, annual payment amounts, and consent and disclosure requirements
- Framework for electronic communications
- Quantitative limits to apply at the account level

CAPSA's DC Pension Plans Guideline

- Guideline No. 8 "Defined Contribution Pension Plans Guideline"
 - Provides guidance to plan administrators concerning member communications and retirement tools

CAPSA's DC Pension Plans Guideline

- DC Guidelines provide:
 - Information during accumulation phase to assist members to determine their retirement goals and how to achieve those goals:
 - Information about investment choices
 - Information about contributions
 - Estimates of accumulated value at retirement

CAPSA's DC Pension Plans Guideline

- DC Guidelines provide:
 - Information for members who are approaching payout phase
 - Options at retirement
 - Retirement products available
- Plan administrators must exercise caution when drafting and sending communications and providing retirement income estimates

Alberta EPPA

- In July 2014, Alberta passed Regulations supporting the new EPPA
- Together, the new EPPA and the Regulations came into force on September 1, 2014
- Changes to administrative practices and plan amendments are required
- Apply to Alberta registered plans and plans with AB members

Alberta EPPA

- Prescribed default investment fund
 - Balanced fund; or
 - "portfolio of investments that takes into account a member's age" (i.e., a target date fund or life cycle fund)

Alberta EPPA

- Plans must be administered in accordance with the new EPPA and Regulations effective September 1, 2014
- However, the deadline for implementing the new default investment fund has been extended to June 30, 2015
 - Contributions deposited in a default fund prior to the establishment of a prescribed default fund may remain; no requirement to transfer

The ORPP

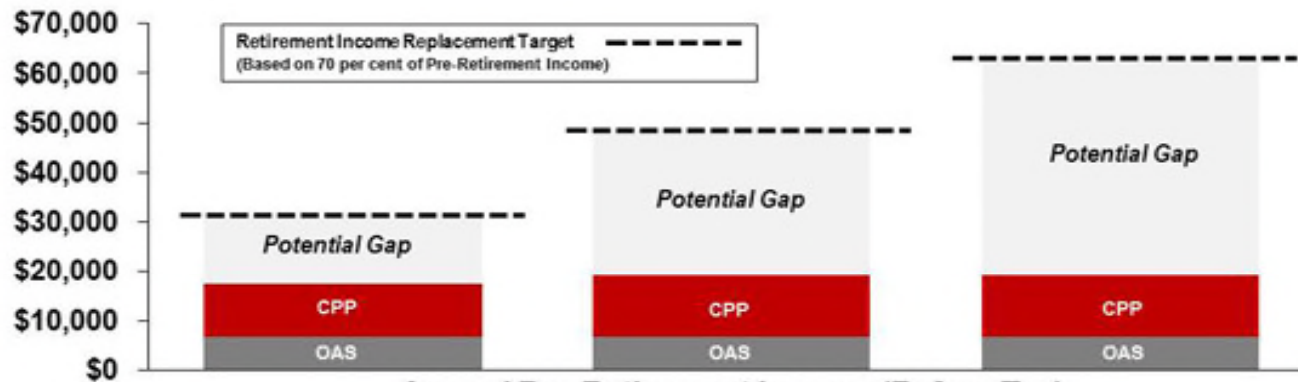
- Originally introduced in 2014 Ontario Budget
- ORPP targets the "retirement savings gap"
 - Two thirds of Ontario workers do not belong to a pension plan
 - Voluntary savings inadequate
 - CPP, OAS (and GIS) provide minimal benefits

The "Retirement Savings Gap"

CHART 4.1

Retirement Income Targets and Potential Gaps

Annual Retirement Income (Before Tax)



Annual Pre-Retirement Income (Before Tax)

	At \$45,000	At \$70,000	At \$90,000
Retirement Income Target	\$31,500	\$49,000	\$63,000
Potential Gap	\$14,109	\$29,829	\$43,829

Notes: CPP amounts assume the individual contributes for 40 years, begins collecting CPP at age 65 and had steady career before-tax earnings of \$45,000, \$70,000 and \$90,000, expressed in 2014 dollars. OAS benefit amounts are based on estimates for 2014 and assume the individual has been a resident of Canada for 40 years after the age of 18, and begins collecting benefits at age 65. The target income levels are based on 70 per cent of pre-retirement income. Figures do not take into account the impact of income tax.
Source: Ontario Ministry of Finance.

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ORPP – The Details

- Bill 56, *Ontario Retirement Pension Plan Act, 2014*, introduced on December 8, 2014
 - Provides for the establishment of an entity responsible for ORPP administration, and sets out basic design requirements
 - The basic design requirements largely mirror prior announcements

ORPP - Bill 56

- A defined benefit plan (similar to the CPP)
 - ORPP's maximum earnings threshold ("MET") for 2017 would be based on a rate of \$90,000, indexed for inflation between 2014 and 2017
 - Contributions shared equally by participating employers and employees, subject to a combined rate of 3.8%
 - Contribution rate to be phased-in
- Mandatory participation
 - Mandatory for individuals employed in Ontario who are 18 to 69 years of age, with incomes above minimum threshold
 - Exemptions – federally regulated employees, employees who participate in "comparable" workplace plans and the self-employed

ORPP – December 17th Consultation Paper

- Key Design Questions
 - Most significant is the "comparable" workplace plan issue
 - The government's stated preference is that only DB and target benefit MEPPs be recognized as comparable
 - But, the paper invites input on whether there are circumstances whereby DC plans should be considered comparable
 - The consultation paper also discusses:
 - Low-income threshold (the government's stated preference is to mirror the CPP earnings threshold of \$3,500)
 - How best to assist self-employed with retirement

ORPP – Comparable Plan Issue

- Susie's Manufacturing Ltd. scenario
 - Susie's Manufacturing Ltd. provides a voluntary DC pension to individuals who are employed at the manager level and above, after two years of continuous service [the plan is not available to other employees]
 - Members contribute 9% of their annual earnings, and Susie's Manufacturing Ltd. makes matching contributions (total of 18%)
- If this generous DC pension plan is not considered "comparable" then Susie's Manufacturing and participating employees will face additional pension costs – for the ORPP

ORPP – Other Eligibility Issues

- Even if an employer's retirement plan is determined to be "comparable" for ORPP purposes
 - What about positions that are not eligible for the employer plan?
 - What happens during any waiting/eligibility period?
 - What about an employee who opts out of an employer's voluntary plan
- Would each of these employees be required, or eligible to participate in the ORPP? When?

ORPP – Employer Considerations

- Design of employer-sponsored retirement plans
 - Establish a new plan, or re-design an existing arrangement, to avoid participation in the ORPP?
 - Seek to reduce benefits or contributions in existing arrangement, so as to maintain overall cost (employer plan + ORPP)?
 - Close existing plans, in favour of the ORPP?
 - Different approach for Ontario vs. non-Ontario employees?
- Non-union employees – constructive dismissal issue if employer benefits are reduced?
- Unionized employees – negotiation issue where no "comparable" workplace plan, and for categories of employment that are not eligible for workplace plan?

ORPP - What Next?

- Submissions on the Design Consultation Paper are due by February 13, 2015
 - Given the government's preference that the "comparable" pension plan exclusion be limited to DB plans and target benefit MEPPs, sponsors of other types of plans (i.e. DC pension plans, group RRSPs, DPSPs) should consider making submissions on this issue
- In labour negotiations, consider bargaining language that takes into account potential new contribution obligations under the ORPP, and that helps to counter increased costs

ESG Factors in Pension Investing

Stephanie J. Kalinowski

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Agenda

- What are ESG factors?
- Why do they matter?
- What do plan administrators need to do?

Background

- Effective January 1, 2016, SIP&Ps must include information about whether ESG factors are incorporated, and if so, how
- SIP&P must be filed with the Superintendent of Financial Services within 60 days of January 1, 2016
- Effective July 1, 2016, annual statements must include information about whether ESG factors are incorporated into the SIP&P and if so, how

What Are ESG Factors?

- Environmental, Social and Governance factors
- No definition in the PBA
- Goes beyond a purely financial analysis
- Not the same as SRI

Why Do They Matter?

- Not the same as a requirement to take ESG factors into account
- Or is it?

Why Do They Matter?

- Prudent person rule codified in Ontario PBA:

22. (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Why Do They Matter?

- Is it a breach of fiduciary duty to take ESG factors into account?
- Is it a breach NOT to take them into account?

Why Do They Matter?

- *Cowan v. Scargill*, [1985] Ch. 270
- U.K. National Coal Board ("NCB") mineworkers pension plan
- Equal number of trustees appointed by union and NCB
- Union trustees objected to permitting oil and overseas investments, based on general position taken by union
- NCB-appointed trustees sought order from court

Why Do They Matter?

The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries...When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment...the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospect of the yield of income and capital appreciation both have to be considered in judging the return from the investment.

Why Do They Matter?

- How much weight should they be given?
- Can ESG factors be used to exclude certain investments outright?
- To what extent can the views of plan members be considered?

Why Do They Matter?

I am not asserting that the benefit of the beneficiaries which a trustee must make his paramount concern inevitably and solely means their financial benefits, even if the only object of the trust is to provide financial benefits.....But I would emphasise that such cases are likely to be very rare, and in any case I think that under a trust for the provision of financial benefits the burden would rest, and rest heavy, on him who asserts that it is for the benefit of the beneficiaries as a whole to receive less by reason of the exclusion of some of the possibly more profitable forms of investment.

Why Do They Matter?

- Court held that a policy designed to benefit the domestic coal mining industry was too remote to be directed at the best interests of the beneficiaries

What Should Plan Administrators Do?

- Develop a definition of "ESG" for the SIP&P
- Understand fiduciary duties as they apply to investing
- Develop a decision-making process
 - Understand the financial impact of decisions
 - Does the plan itself contain restrictions?
- Consider asking investment managers how they define and measure ESG factors

What Should Plan Administrators Do?

- You have a year to comply but...
- Don't ignore it!
- Don't leave it until the last minute!

What's New?

Case Law, Legislative and Regulatory Update

John Prezioso
Jennifer Del Vecchio

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Overview

- Cross-Canada regulatory update
- Three recent cases and the lessons learned

1. Statements to Retirees and Former Employees

- Growing trend in pension reform is requirement to provide periodic statements to retirees and/or deferred vested members
 - Ontario: required effective January 1, 2015
 - first statement due by July 1, 2017, and bi-annually thereafter
 - Alberta: required effective December 31, 2014 (for retired members only)
 - annually, within 180 days after the end of each fiscal year
 - Federal: proposed on September 19, 2014
 - will be due annually, but not yet in effect
 - (B.C. will likely follow suit with Alberta)

1. Statements to Retirees and Former Employees

- First time plan administrators have to regularly communicate to this group of plan members
- Plan administrators may want to use this opportunity to:
 - remind members to review and update beneficiary and spousal designations
 - consider implementing electronic communications
 - consider re-evaluating employee termination and retirement protocols

2. Ontario Requirement to Insure LTD

- Since July 1, 2014, federally-regulated private sector employers have been required to insure LTD benefits on go-forward basis
- Ontario has passed legislation requiring LTD benefits to be insured (legislation is not in force)
- Scope of Ontario requirement still to be determined
- Disability benefits under an RPP will be exempt
- Other exemptions may apply
- Consultation period open until March 6, 2015

3. Changes to Federal Pension Investment Rules

- Federal government has released proposed amendments to the federal pension investment rules
- Key changes to:
 - 10% concentration rule
 - Related party transaction rules
- When changes come into effect, they will apply to plans registered federally and in most provinces, including ON
- Administrators will have to review SIPPs, IMAs, investment fund documentation and compliance monitoring processes for consistency with the new rules

4. What's On The Horizon for 2015?

- British Columbia...
 - Pension reform received Royal Assent on May 31, 2012, but still waiting on supporting regulations
 - Expected to be announced effective at some point in 2015
- Nova Scotia...
 - Pension reform received Royal Assent on December 15, 2011
 - Draft regulations released for public comment in 2011 and 2012

General Motors of Canada Limited v. Ontario (Superintendent of Financial Services) (2014) (Ont. F.S.T.)

Facts

- Plan provided for contractual indexing of DB benefits
- From inception, Plan administered to provide indexing to members who retire from active employment, but not those who terminate prior to retirement eligibility
- The Plan's termination benefits provision initially referred to the indexing provision, but was later amended to remove the reference

***General Motors of Canada Limited v. Ontario
(Superintendent of Financial Services) (2014) (Ont. F.S.T.)***

Facts

- In 2011, Employer amended the Plan to freeze DB accruals
- 2011 amendment confirmed that indexing only applies to active employees who were retirement-eligible on the amendment date
- Employees challenged the 2011 amendment and the Ontario pension regulator refused to register it
- Employer requested a hearing before the Ontario FST

***General Motors of Canada Limited v. Ontario
(Superintendent of Financial Services) (2014) (Ont. F.S.T.)***

Decision

- FST rejected the Employer's argument based on the specific language of the Plan and based on the Ontario PBA
- PBA distinguishes between "pension benefits" and "ancillary benefits" and the protection each enjoys

General Motors of Canada Limited v. Ontario (Superintendent of Financial Services) (2014) (Ont. F.S.T.)

Decision

Pension Benefits (e.g. base pension)	Ancillary Benefits (e.g. early retirement enhancements)
Higher protection under the PBA	Lower protection under the PBA
Accrue on a "gradual and uniform" basis	"Cliff vest" once all eligibility requirements* to receive the ancillary benefit have been satisfied
Amount and value cannot be reduced in respect of pre-amendment service	Can be eliminated for member who has not met <u>all</u> eligibility requirements* on the amendment date

*ignoring requirement for the employer to consent to the ancillary benefit

***General Motors of Canada Limited v. Ontario
(Superintendent of Financial Services) (2014) (Ont. F.S.T.)***

Decision

- PBA protection could be circumvented if any benefit could be characterized as an "ancillary benefit"
- "Ancillary benefits" must be a closed group [PBA, s. 40(1)]
- Indexing is not listed, so it must be a "pension benefit"
- "Pension benefits" accrue on a gradual and uniform basis as service accumulates

***General Motors of Canada Limited v. Ontario
(Superintendent of Financial Services) (2014) (Ont. F.S.T.)***

Implications

- Contractual indexing "attaches" to the underlying base benefit as a member accumulates service
- Under a single-employer plan, ON member's contractual indexing cannot be reduced/eliminated for past service
- Can eliminate indexing for future service
- "Phase two" of FST proceedings still to come
- FST decisions are subject to appeal

NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213 (2014) (B.C. L.R.B.)

Facts

- Employer historically sponsored a Canada-wide DB pension plan
- In 2002, Employer implemented a DC plan for all new employees
- Existing employees were given a one-time choice to remain in the DB plan or switch to DC
- 19 members of the Employer's B.C. bargaining unit remained in the DB plan

NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213 (2014) (B.C. L.R.B.)

Facts

- In 2012, the Employer announced that all employees who remained in the DB plan would be switched to the DC plan as of January 1, 2013
- The Union grieved the requirement to switch to the new DC plan, arguing that the Employer was estopped from compelling the switch

NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213 (2014) (B.C. L.R.B.)

Arbitration Decision

- The three elements of estoppel are:
 - (1) an existing legal relationship;
 - (2) an unequivocal representation by the first party; and
 - (3) detrimental reliance on that representation by a second party
- Legal relationship existed as per the collective agreement

NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213 (2014) (B.C. L.R.B.)

Decision

- Enrollment Form provided at time of conversion stated “Your choice will remain in effect as long as you are actively employed by NCR”
- Employer could not rely on a statement in another document provided at the time of conversion that the Employer reserved the right to amend the pension plan

NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213 (2014) (B.C. L.R.B.)

Decision

- Detrimental reliance was established
- Evidence given by two bargaining unit members who testified that, when they conducted their retirement planning, they assumed that they would remain in the DB plan for the remainder of their employment with the Employer

NCR Canada Ltd. v. International Brotherhood of Electrical Workers, Local 213 (2014) (B.C. L.R.B.)

Implications

- Novel use of estoppel argument
- Previously, DB-to-DC conversion cases focused on negligent misrepresentation
- Employees not only delayed their DB-to-DC switch, they established a right to remain DB for the duration of their employment with the Employer
- Clear and accurate communications with respect to a pension plan conversion are critical

Industrial Alliance Insurance and Financial Services Inc. v. Brine (2014) (N.S.S.C.)

Facts

- LTD overpayment case with broader lessons to be learned
- Employee, a police officer, commenced receipt of LTD benefits due to mental distress and depression
- Under the LTD policy benefits were reduced by certain amounts received by the disabled employee
- Employee received a large retroactive lump sum payment of benefits under the Employer's pension plan and CPP, resulting in a \$100,000 overpayment of LTD benefits

Industrial Alliance Insurance and Financial Services Inc. v. Brine (2014) (N.S.S.C.)

Facts

- Insurer reduced the Employee's LTD benefits to \$0 until the overpayment was fully recovered
- Employee later declared bankruptcy
- Insurer sued the Employee for \$210,000 in lost earnings damages that the Employee had "double-recovered" through a human rights proceeding
- Employee counter-claimed for aggravated and punitive damages due to bad faith conduct by the Insurer

Industrial Alliance Insurance and Financial Services Inc. v. Brine (2014) (N.S.S.C.)

Decision

- Court held that the Insurer was entitled to the lost earnings damages the Employee had received, but awarded much larger damages to the Employee

Industrial Alliance Insurance and Financial Services Inc. v. Brine (2014) (N.S.S.C.)

Decision

- LTD policy's clawback language did not entitle the Insurer to a total upfront clawback
- Policy required an incremental clawback over time
- Insurer acted in bad faith by (among other things) reporting the Employee's LTD benefits on a T4 as taxable, despite having evidence that they were non-taxable
- Insurer's bad faith conduct exacerbated the Employee's financial hardship and worsened his depression

Industrial Alliance Insurance and Financial Services Inc. v. Brine (2014) (N.S.S.C.)

Decision

- Court awarded damages to the Employee:
 - \$62,000 that Employee had repaid to Insurer that would have been extinguished by Employee's bankruptcy if clawback had been more gradual
 - \$30,000 in general damages for mental distress
 - \$150,000 in aggravated damages
 - \$500,000 in punitive damages

Industrial Alliance Insurance and Financial Services Inc. v. Brine (2014) (N.S.S.C.)

Implications

- Overpayments can arise in a number of circumstances both within and outside the insurance context
- Although the principles and rules found in this decision should be applied with caution to other contexts, the case illustrates some important lessons

Industrial Alliance Insurance and Financial Services Inc. v. Brine (2014) (N.S.S.C.)

Implications

- Clawback provisions in pension, incentive, wage-loss replacement and other compensation programs should be carefully drafted and reviewed to ensure clarity and compliance with applicable legislation
- Ambiguity will be interpreted against the drafting party

Industrial Alliance Insurance and Financial Services Inc. v. Brine (2014) (N.S.S.C.)

Implications

- Decision-makers will make every effort to protect vulnerable individuals (disabled employees, retirees and others)
- Decision-makers may refuse to enforce a clawback provision on the grounds that the result would be unreasonable or unconscionable
- Unreasonable or bad faith conduct can exacerbate financial hardship or medical conditions and attract aggravated and punitive damages

Ethical and Professional Issues in Context: Clawback of Incentive Compensation

Frank Cesario

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Ethical and Professional Issues in Context

- Our question:

What ethical and professional issues may arise for in-house counsel in the context of the design and implementation of compensation clawbacks?

Compensation Clawbacks

- What are they?
- What could they look like?
- Who gives you instructions to design and/or implement them?
- Who is (potentially) affected by them?

Rules of Professional Conduct

- Who is your client?
- When do you have a conflict of interest?

Who is Your Client?

- Rule 3.2-3: **When Client an Organization**

*Notwithstanding that the instructions may be received from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising the lawyer's duties and in providing professional services, **the lawyer shall act for the organization.***

Conflicts of Interest

- Rule 3.4-1: **Duty to Avoid Conflicts of Interest**

A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted by the rules in this Section.

- A conflict exists where there is a "substantial risk" that a lawyer's loyalty to or representation of a client will be "materially and adversely affected" by the lawyer's own interest or duties to another client, former client or third person.

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